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16TH ANNUAL ENTERTAINMENT AND MEDIA LAW CONFERENCE | JANUARY 17, 2019

#MeToo – New Legislation in California and New York

CALIFORNIA

AB 2770 – Privileged Communications: Communications Regarding Sexual Harassment (Effective January 1, 2019)

Existing law authorized an employer to inform a prospective employer whether the employer would rehire an employee. Such a communication is deemed privileged and protected from a defamation lawsuit under section 47 of the California Civil Code if the communication is made without malice.

AB 2770 amends section 47 of the Civil Code to add among those privileged communications the following, when made without malice: (a) complaints of sexual harassment by an employee to an employer based on credible evidence; (b) communications between the employer and interested persons regarding a complaint of sexual harassment; (c) communications by the employer regarding whether the employer's decision to not rehire the employee is based on the employer's determination that the former employee engaged in sexual harassment.

AB 3109 – Contracts: Waiver of Right of Petition or Free Speech (Effective January 1, 2019)

AB 3109, codified at section 1670.11 of the California Civil Code, makes void and unenforceable a provision in a contract or settlement agreement that waives a party's right to testify in an administrative, legislative or judicial proceeding concerning alleged criminal conduct or sexual harassment.

SB 224 – Personal Rights: Civil Liability and Enforcement (Effective January 1, 2019)

The California Fair Employment and Housing Act ("FEHA") protects against discrimination or harassment on account of various protected characteristics. The FEHA also provides that it is unlawful for any person to deny or to aid, incite or conspire in the denial of certain civil rights. The California Department of Fair Employment and Housing ("DFEH") is the state agency charged with enforcing California's civil rights laws, including the FEHA.

SB 224, which amends section 51.9 of the California Civil Code and sections 12930 and 12948 of the Government Code, makes, among other things, the DFEH responsible for the enforcement of sexual harassment claims and makes it an unlawful practice to deny or to aid, incite or conspire in the denial of rights of persons related to sexual harassment actions.

SB 820 – Settlement Agreements: Confidentiality (Effective January 1, 2019)

SB 820, codified at section 1001 of the California Code of Civil Procedure, makes a provision in a settlement agreement, which is entered into on or after January 1, 2019, and which prevents the disclosure of the factual information relating to the following civil and/or administrative claims, void as a matter of law and against public policy: (a) sexual assault; (b) sexual harassment under section 51.9 of the Civil Code; (c) workplace harassment or discrimination based on sex; (d) failure to prevent an act of workplace harassment or discrimination based on sex; (e) retaliation against a person for reporting workplace harassment or discrimination based on sex; and (f) housing harassment or discrimination based on sex or retaliation against a person for reporting housing harassment or discrimination based on sex.

This bill expressly allows: (1) at the request of the claimant, that the settlement agreement include a provision that shields the identity of the claimant and all facts that could lead to the discovery of his or her identity, including pleadings filed in court as long as the opposing party is not a government agency or public official; and (2) that the settlement agreement include a provision that shields the disclosure of the amount paid in settlement of a claim.

SB 826 – Corporations: Boards of Directors
(Effective January 1, 2019)

SB 826, which adds sections 301.3 and 2115.5 to the California Corporations Code, requires, among other things, that by December 31, 2019, a publicly held corporation (whether domestic or foreign) whose executive offices are located in California (according to the corporation's SEC 10-K form) have a minimum of one female director on its board of directors. No later than December 31, 2021, any corporation that has five directors must have at least two female directors, and any corporation that has six or more directors must have at least three female directors.

This new law also requires that, by July 1, 2019, the California Secretary of State publish a report on its website documenting the number of corporations that have at least one female director. By March 1, 2020, and annually thereafter, the Secretary of State must publish a report on its website regarding at least the following: (a) the number of corporations subject to this law that were in compliance with the requirements of the law during at least one point during the preceding calendar year; (b) the number of publicly held corporations that moved their United States headquarters to California from another state or out of California into another state during the preceding calendar year; and (c) the number of publicly held corporations that were subject to this law during the preceding year, but that are no longer publicly traded.

The bill also provides that the Secretary of State may adopt regulations to implement the new law and may impose hefty fines for violations as follows: (a) $100,000 for failure to timely file board member information with the Secretary of State for the initial violation; and (b) $300,000 for a second or subsequent violation(s).

SB 1300 – Unlawful Employment Practices: Discrimination And Harassment (Effective January 1, 2019)

Pursuant to the FEHA, employers may, among other things, be responsible for the acts of non-employees with respect to sexual harassment of employees and others, including applicants, unpaid interns and volunteers, if employers, or their agents or supervisors, know or should have known of the wrongful conduct and failed to take immediate and appropriate corrective action.

Under SB 1300, which amends sections 12940 and 12965 of the California Government Code and adds sections 12923, 12950.2 and 12964.5 to the Government Code, employers can now be held responsible for the acts of non-employees with respect to any other harassment activity prohibited by the FEHA, *i.e.*, harassment based on other protected characteristics including, but not limited to, race, religious creed, color, national origin and ancestry.

SB 1300 also prohibits employers, in exchange for a raise or bonus, or as a condition of employment, from: (1) requiring the execution of a release of a claim or right under the FEHA, or (2) requiring an employee to sign a non-disparagement agreement or other document that purports to deny the employee the right to disclose information about unlawful acts in the workplace, including, but not limited to, sexual harassment. Any agreement or document in violation of either of the above provisions is contrary to public policy and unenforceable.

SB 1300 also authorizes (but does not require) employers to provide bystander intervention training to their employees, *i.e.*, training that would include information and practical guidance on how to enable bystanders to recognize potentially problematic behaviors and to motivate bystanders to take action when they observe these behaviors.

Finally, SB 1300 affirms, disapproves or rejects several court decisions as follows:

- Affirms the standard in Justice Ruth Bader Ginsburg's concurrence in *Harris v. Forklift Systems*, 510 U.S. 17 (1993), which states that, in a workplace harassment suit, "the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment. It suffices to prove that a reasonable person subjected to the discriminatory conduct would find … that the harassment so altered working conditions as to make it more difficult to do the job."
- Rejects the Ninth Circuit's decision in *Brooks v. City of San Mateo*, 229 F.3d 917 (2000), and provides that a single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile or offensive working environment.
- Affirms the California's Supreme Court's decision in *Reid v. Google, Inc.*, 50 Cal.4th 512 (2010), rejecting the "stray remarks doctrine," and providing that the existence of a hostile work environment depends upon the totality of the circumstances and a discriminatory remark, even if not made directly in the context of an employment decision or uttered by a non-decisionmaker, may be relevant, circumstantial evidence of discrimination.
- Disapproves of any language, reasoning or holding to the contrary in the decision *Kelley v. Conco Companies*, 196 Cal. App.4th 191 (2011), and provides that the legal standard for sexual harassment should not vary by type of workplace.
- Affirms the decision in *Nazir v. United Airlines, Inc.*, 178 Cal.App.4th 243 (2009), and its observation that hostile working environment cases involve issues "not determinable on paper," and states that harassment cases are rarely appropriate for disposition on summary judgment.

SB 1343 – Sexual Harassment Training: Requirements
(Effective January 1, 2020)

SB 1343, which amends sections 12950 and 12950.1 of the California Government Code, expands sexual harassment training requirements for employers who employ five or more employees, including temporary or seasonal employees. By January 1, 2020, and once every two years thereafter, such employers are required to provide at least two hours of sexual harassment training to all supervisors and managers, and at least one hour of sexual harassment training to all non-supervisory employees. The training must address the prevention of abusive conduct as well as harassment based on gender identity, gender expression, and sexual orientation.

This bill also requires the DFEH to: (a) develop or obtain one-hour and two-hour online training courses on the prevention of sexual harassment in the workplace and to post the courses on its website; and (b) make existing informational posters and fact sheets, as well as the online training courses regarding sexual harassment prevention, available on the DFEH's website.

NEW YORK

N.Y. Lab. Law § 201-g: Mandatory Sexual Harassment Prevention Policy and Training (Effective October 9, 2018)

As part of the new budget, New York State enacted section 201-g of the Labor Law, which requires all New York employers to adopt sexual harassment policies and training that meet or exceed a model policy and training prepared jointly by the New York Department of Labor and the New York State Division of Human Rights. *See* https://www.ny.gov/programs/combating-sexual-harassment-workplace. Employers are required to provide the sexual harassment training on an annual basis to all employees. Employers must provide the training in the primary language spoken by their employees if the Division of Human Rights has provided the training templates in the employees' primary language.

The deadline for employers to complete the initial round of training for their employees was January 2019, although the State has since pushed the deadline back to October 9, 2019. Employers are not required to train "non-employees" (*e.g.*, contractors) but are encouraged to provide the policy and training to anyone providing services in the workplace.

N.Y. Exc. Law § 296-D: Extension of Protections of Harassment Law to Non-Employees (Effective April 2018)

This new law makes it an unlawful discriminatory practice for an employer to permit sexual harassment of non-employees in the workplace. Under the law, an employer may be held liable to a non-employee who is a contractor, subcontractor, vendor, consultant or other person providing services pursuant to a contract in the workplace when the employer, its agents or its supervisors knew or should have known that the non-employee was subjected to sexual harassment and the employer failed to take prompt and appropriate corrective action.

N.Y. C.P.L.R. § 7515: Prohibition on Mandatory Arbitration Clauses (Effective July 11, 2018)

This law prohibits any contract that requires arbitration of any allegation or claim of sexual harassment, except where inconsistent with federal law. The law makes mandatory arbitration clauses for sexual harassment claims in existing contracts null and void, but does not render an entire contract unenforceable. Note that this prohibition is subject to challenge under the Federal Arbitration Act, which preempts state rules that disfavor arbitration.

N. Y. Gen. Oblig. Law § 5-336: Prohibition on Non-Disclosure Agreements (Effective July 11, 2018)

This law prohibits employers from including "any term or condition that would prevent the disclosure of the underlying facts and circumstances to the claim or action" in any settlement, agreement or other resolution of any claim involving sexual harassment (whether or not a lawsuit has been brought), unless the complainant requests confidentiality. The law provides specific notice and documentation requirements if the complainant requests confidentiality.

N.Y. City Law 2018/096: Stop Sexual Harassment in NYC Act (Effective September 6, 2018)

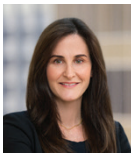
On May 9, 2018, New York Mayor Bill de Blasio signed the Stop Sexual Harassment in NYC Act (the "Act"), which brings about a number of significant changes.

Under the Act, employers with 15 or more employees in New York City are required to comply with training and notice requirements mandated by the City. Employers are required to conduct annual sexual harassment prevention trainings for all employees. The training is required within 90 days of an employee's initial hire for any employee who works more than 80 hours in a calendar year on a part-time or full-time basis.

The law provides specific guidelines for compliant training and requires employers to maintain records of all such trainings, including signed employee acknowledgements, for at least three years. The training requirement goes into effect on April 1, 2019.

Another measure enacted through the Act increases the statute of limitations for filing claims alleging gender-based harassment from one year to three years from the time that the alleged harassment occurred. A separate component of the Act expands coverage under the New York City Human Rights Law to employers with four or fewer employees as to claims involving gender-based harassment. These expansions took effect as of May 9, 2018.

The new law also requires all employers in New York City to display an anti-sexual-harassment rights and responsibilities poster created by the New York City Commission on Human Rights in employee breakrooms or other common areas. This requirement took effect on September 6, 2018.



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